

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on December 13, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman  
Patricia L. Acampora  
Maureen F. Harris  
James L. Larocca  
Gregg C. Sayre

CASE 11-M-0710 - In the Matter of Reviewing and Amending the  
Electric Submetering Regulations, 16 NYCRR  
Part 96.

MEMORANDUM AND RESOLUTION ADOPTING RESIDENTIAL  
ELECTRIC SUBMETERING REGULATIONS

(Issued and Effective December 18, 2012)

BY THE COMMISSION:

INTRODUCTION

By Notice of Proposed Rulemaking, dated January 24, 2012 and published February 8, 2012 in the New York State Register (SAPA12-M-0710SP1), we proposed revised regulations pertaining to residential electric submetering (16 NYCRR Part 96). After an extension of the comment period to April 26, 2012 and in response to these comments (April 2012 comments) as well as in-person technical and informational meetings, the Department revised the initial draft submetering regulations and reissued them for comment. We published in the State Register (SAPA12-M-0710SP2) new proposed submetering regulations on September 5, 2012. The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding the September 5, 2012 publish date expired on

October 20, 2012 (October 2012 comments). Most notably, the regulations:

- (1) Implement Public Service Law §53, which applies the Home Energy Fair Practices Act to submeterers;
- (2) Incorporate Commission orders that have been issued in submetering authorizations since the submetering regulations were first adopted in 1988;
- (3) Create a bifurcated review process for submetering requests in order to expedite routine requests for authorization to submeter;
- (4) Ensure that submeters are of a sufficient quality and are regularly calibrated to help assure accurate billing; and
- (5) Provide remedies for when submeterers fail to adhere to tariffed service conditions and fail to cure such failure(s).

April 2012 comments were filed by American Metering & Planning Services, Inc. & Elemco Building Controls (AMPS/Elemco), Bay City Metering Company, Inc. (BC), Hon. Kevin A. Cahill, Chair, NYS Assembly Standing Committee on Energy and Hon. Charles D. Lavine, Chair, NYS Assembly, Administrative Regulations Review Commission (Cahill & Lavine) Car Charging Group, Inc., City of New York (NYC), Coulomb Technologies, Consolidated Edison Company of New York, Inc. (Con Edison), Consumer Power Advocates (CPA), Council of New York Cooperatives & Condominiums (CNYC), Energy Investment Systems, Inc. (EIS), Environmental Defense Fund (EDF), Herbert E. Hirschfeld, P.E. (Hirschfeld), Hon. Micah Z. Kellner, NYS Assembly (Kellner), Minol, Inc., New York State Energy Research and Development Authority (NYSERDA), Real Estate Board of New York (REBNY) and Quadlogic Controls Corporation (QL). In response to these

comments as well as in-person technical and informational meetings, the Department revised the initial draft submetering regulations and reissued them for comment.

Comments in response to the September 2012 second SAPA New York State Register notice (October 2012 comments) were submitted were submitted by AMPS-ELEMCO, Inc. (AMPS), Bay City Metering Company, Inc. (BC), City of New York (NYC), Consolidated Edison Company of New York, Inc./Orange & Rockland Utilities, Inc. (CE/O&R), Mothers on the Move/Madres en Movement (MOM), Niagara Mohawk Corporation d/b/a National Grid (NG), New York State Energy Research and Development Authority (NYSERDA), Public Utility Law Project of New York Inc. (PULP), Quadlogic Controls Corporation (QL), and Real Estate Board of New York (REBNY).

#### BACKGROUND

In 1976, the Public Service Commission (PSC, Commission) reinstated its policy of allowing submetering and in 1988 adopted submetering regulations. Once enacted, 16 NYCRR Part 96 allowed for the use of residential submetering in multi-unit dwellings within broad parameters. Since that time, implementation of electric submetering has expanded, largely due to its energy efficiency benefits and the opportunity for landlords to pass the increasing costs of electricity to tenants by separating these costs from rent after the installation of submeters.<sup>1</sup>

In 2003, the Public Service Law was amended to extend the statutory requirements of the Home Energy Fair Practices Act (HEFPA, Public Service Law Article 2) to "any entity that, in

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<sup>1</sup> Due to safety concerns, no provisions exist allowing residential gas service submetering.

any manner, sells or facilitates the sale . . . of . . . electricity to residential customers.”<sup>2</sup> Therefore, inasmuch as submeterers are now statutorily required to provide residents all HEFPA protections, including, among other things, notice of service termination, budget billing, and deferred payment agreements, our submetering regulations are being amended to incorporate and effectuate such requirements. To best effectuate HEFPA, submetering regulations now require, among other things, systematic submeter testing (to help ensure billing accuracy), that submeters be installed that are capable of service termination, and that as installed submetering systems fail or are updated they be replaced with submetering systems capable of service termination. Similarly, the new regulations codify HEFPA’s service requirements for cooperatives and condominiums because HEFPA protections were extended to all residential end-users by virtue of PSL §53.

The proposed changes to 16 NYCRR Part 96 establish a bifurcated process, one for routine petitions to submeter (“Notices of Intent to Submeter” or Notices), by which the Department intends to expedite submetering authorizations that pose no novel, electric heat, or other public interest concerns. Submetering applicants should expect more rigorous review of “Petitions to Submeter,” (Petitions) which must be filed when submeters will measure the electricity used for electric heat or when a landlord seeks to convert direct metering to submetering. Expediting the process by which submeterers obtain approval to submeter as well as strengthening submetering oversight assists

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<sup>2</sup> In a 2006 New York Supreme Court decision, PSL §53 was held to apply to submeterers. Matter of Waterside Plaza, LLC, v. Pub. Serv. Commn. of State of N.Y., Slip Opinion (July 3, 2006, Ferradino, J.).

the Commission's consumer protection and energy efficiency goals.

Since the original submetering regulations were adopted, submetering has gained momentum in part because landlords reduce their ever-increasing electric costs. The proposed rules continue to incentivize landlords to submeter by allowing them to convert to submetering even when direct meters are currently installed and by allowing landlords to charge residents the residential rate while paying the lower, master-metered rate to the distribution utility, where such rate exists. The revised regulations do not change these long-standing practices.

They do, however, (1) improve the submetering approval process by expediting it through use of the "Notice(s) of Intent to Submeter," submitted with the list of required documents (16 NYCRR §§96.3(c), 96.3(d), 96.5); (2) clarify for submeterers the service conditions pursuant to (a) Public Service Law §53; and (b) prior Commission orders by which they redistribute electricity enacted by specifying those service conditions in one place (§96.6); (3) improve the standards of submetering equipment; and (4) include remedies the Department of Public Service may use when a submeterer fails to cure service conditions violations.

#### DISCUSSION AND ANALYSIS OF COMMENTS

##### Commission Authority to Authorize Submetering

The Commission's authority to regulate submetering in general and to develop the proposed revisions to 16 NYCRR Part 96 is contained in Public Service Law (PSL) §66(12), which gives the PSC broad authority over electric utility tariffs; PSL §65,

which requires the Commission to ensure that electric service is safe and adequate, and just and reasonable; and PSL §4(1), which assigns the PSC "all powers necessary or proper" to carry out these mandates. Utility tariffs not only set rates for each service classification, they govern the manner in which electricity is provided and the obligations of customers in each service classification. Master-metered buildings that have submetering have been governed by certain service classification standards and requirements since 1978; those requirements are incorporated into these new regulations; utility tariffs will be amended to reflect the new regulations.

The Commission's authority to govern and interpret tariffs is well-settled.<sup>3</sup> In 1951, when the Commission first prohibited submetering, in a decision that was upheld upon judicial review, the court relied on the Commission's authority to regulate "reasonable classifications, regulations and practices under which a utility . . . renders service."<sup>4</sup> Later, in 1976, in Case 26998, the Commission banned master-metering in new construction because it discouraged energy conservation, which sparked a submetering revival, and in 1988, the Commission adopted submetering regulations, with which submeterers have generally complied. Pursuant to those regulations, the Commission has approved petitions to submeter on a case-by-case basis. In some of these unchallenged orders authorizing submetering, the Commission has, among other things, adopted generic submetering service standards that apply to premises in

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<sup>3</sup> See In the Matter of Glens Falls Communication, Inc. v. Public Serv. Comm'n of State of N.Y., 239 A.D.2d 47 (3<sup>rd</sup> Dept. 1998); In the Matter of Black radio Network, Inc. v. Public Serv. Commn. of State of N.Y., 253 A.D.2d 22 (3<sup>rd</sup> Dept. 1999).

<sup>4</sup> Matter of Campo Corp. v. Feinberg, 279 A.D. 302 (1952) aff'd 303 N.Y. 995.

which submetered tenants pay for electric heat, with particular attention to premises in which tenants who receive housing assistance reside. The Commission has also expanded notice requirements to residents when a landlord seeks to submeter.

When, in 2003, the Public Service Law was amended to extend the statutory requirements of HEFPA to "any entity that, in any manner, sells or facilitates the sale . . . of . . . electricity to residential customers," it became necessary to ensure that submeterers also complied with HEFPA. This application of HEFPA to submetering was upheld in a 2006 New York Supreme Court decision. It confirms that submeterers are required by statute to provide residents all HEFPA protections, including notice of service termination, budget billing, and deferred payment agreements.<sup>5</sup>

The regulations we are adopting in this order, therefore, not only specify the requirements by which future submetering petitions will be authorized, they create service conditions with which all submeterers must comply to retain their current Commission authorization to submeter. Similarly, the regulations create administrative remedies, much like other tariff remedies for non-compliance with service classification requirements. Such tariff enforcement is part and parcel of the Department's and Commission's oversight of the submetering industry.

#### Definitions - §96.1

The proposed rules establish definitions of terms used in Part 96. First, in its comments, PULP seeks a definition of "unit" be added to the definitions, suggesting a "unit" be

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<sup>5</sup> Matter of Waterside Plaza, LLC, v. Pub. Serv. Commn. of State of N.Y., Slip Opinion (July 3, 2006, Ferradino, J.).

considered a "dwelling," as used in the Shared Meter Law, PSL §52.<sup>6</sup> While the term "unit" is used in some of the definitions, we believe it is self-explanatory within the context of those definitions. PULP also states its belief that use of the word "tenants" throughout the regulations is necessary.<sup>7</sup> The regulations, by intention, use the word "resident" instead of "tenant" when describing end-users. Given that HEFPA, and, therefore the regulations, apply to renters, coop shareholders, and condo owners, use of the word "tenant" is too narrow a description of the universe of end-users to which the regulations apply. PULP also seeks a definition of "submetered customer" since HEFPA now applies to submetering.<sup>8</sup> Because HEFPA applies to submeterers by virtue of their role as facilitators of the sale of electricity, the term "submetered customer" is a misnomer. That being said, however, whenever HEFPA refers to "customers," we read the statute to include submetered end-users.

Quadlogic and REBNY seek clarification of the term, "non-portable electric heating appliances," seeking further language to limit that term to electric resistance heating. As NYSERDA points out, however, the definition of electric heat should include heat pump systems. In the April 2012 comments, NYSERDA specifically suggested that the definition of electric heat include heat pumps because "[m]ultifamily building units

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<sup>6</sup> PULP at 1. While PSL §52 does not, by definition, directly apply to submeterers and submetering services, the submetering regulations nonetheless support the spirit of PSL §52 by prohibiting cross-wiring so that residents do not pay for anything but their own usage; therefore, the use of the same terms as PSL §52 is unnecessary.

<sup>7</sup> Id.

<sup>8</sup> Id.



may have more than a single type of non-portable electric heating appliance, such as a heat pump and electric baseboard in rooms without an exterior wall.”<sup>9</sup> The broader definition of electric heat beyond simply non-portable electric heating appliances, which by definition includes non-portable heat pumps, is unnecessary.

NG suggests that the definition of “Senior Living Facility” should include the requirement that such facilities be “certified,” as is required for “Assisted Living Facilities.”<sup>10</sup> The Commission created a test for what constitutes a Senior Living Facility in Case 97-E-1797. We have added the elements of that test to the final regulations.

Finally, a request was made that we make explicit in these definitions that electric vehicle charging stations are not “submeterers” and are exempted from Commission or utility regulations and standards. New technologies are emerging in electric vehicles and, it is argued, the availability of consumer options may be affected by weighty regulations. The Commission has not established a position on electric vehicles. For purposes of this case, however, electric vehicle charging stations are not submeterers, are not subject to Part 96, and, therefore, are not included in the term “submeterer.”

General Provisions That  
Apply to All Submeterers - §96.2

The regulations require that submeterers abide by Commission submetering orders and the submetering regulations themselves, which specify submeterer service classification

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<sup>9</sup> NYSERDA (April comments) at 2.

<sup>10</sup> NG (October comments) at 2.

conditions. Newly adopted §96.2, therefore, (1) introduces the remedy of a reduced rate cap for submeterers that do not abide by the regulations or Commission-imposed conditions, if necessary, in its authorizing order; (2) authorizes direct-meter-to-submetering conversions in certain circumstances; (3) specifies that Assisted and Senior Living Facilities, and Campgrounds may serve residents through master-metering with no submetering; (4) specifies that Recreational Trailer Parks and Marinas may serve residents through master-metering with submetering without our approval; and (5) specifies that the regulations do not apply to electric vehicle parking facilities.

AMPS and BC seek clarification on whether previously approved submetering installations are required to comply with Part 96 provisions and posit that previously approved installations should not be required to comply with the new regulations. For clarification, the content filing requirements in §96.5 apply only to new Notices and Petitions to submeter. While submetering petitions pending approval need not be amended, upon adoption of these regulations, such petitions will be reviewed in accordance with these regulations. If any regulatory requirements contained herein do not or cannot apply to a pending petition, waivers may be sought. The regulatory requirement that a submeterer comply with the commitments made in their submetering petition, however, even those submitted before these regulations go into effect, is reasonable and does not create undue hardship. Otherwise, the rules codify ongoing service standards with which all submeterers must comply, regardless of when they were authorized to submeter. This includes compliance with HEFPA. Therefore, current submeterers will have to make available to end-users deferred payment agreements, budget billing, and procedures by which customers

may be certified as having medical needs or as elderly, blind or disabled customers, among other things.

As stated in the Regulatory Impact Statement,

. . . the Commission clarifies that the new rules, like all laws, will be prospective. This means that, as stated in newly proposed §96.6(b), currently installed submeters need not be replaced by new submetering technology that allows for service termination but, when replaced, the newly installed submeters must be capable of service termination. Similarly, service problems that have already been resolved by binding arbitration will not be disturbed; however, current lease agreements that include binding arbitration as a remedy were deemed against public policy when PSL §53 was enacted . . . binding arbitration was made void by that 2003 statutory requirement.<sup>11</sup>

MOM comments that an alternative dispute resolution process other than HEFPA should be made available to low income customers. Given that the Department's complaint handling procedures are free of charge and are operated by experienced DPS consumer complaint Staff, establishing another system for resolving submetering complaints is unnecessary and would be a waste of resources.

#### Rate Cap Remedy

Some commented that the Commission has no authority to impose the reduced rate cap described in §96.2(a)(2) and for which the procedural enforcement steps are contained in §96.8(b).<sup>12</sup> That is, the final regulations allow a reduction in the rate cap up to which a submeterer may charge if that

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<sup>11</sup> New York State Register, September 5, 2012 at 46-47.

<sup>12</sup> See QL (April comments) at 14. Bay City, CYNOC, NYC, CPA, REBNY recommend eliminating the administrative penalty altogether.

submeterer fails to abide by the regulations or Commission orders, fails to act consistently with its Notice or Petition to Submeter and fails to cure such violation(s).<sup>13</sup>

The Commission's authority to interpret tariff requirements, of which the reduced rate cap will be one, has been upheld repeatedly, as has the Commission's authority to authorize tariff refunds. Moreover, the rate cap adjustment is similar to other remedies that exist in tariffs when a distribution utility customer fails to abide by their service classification requirements. For instance, when interruptible customers fail to curtail load in accordance with the requirements of their service classification, the customer is subject to a tariff penalty. The rate cap remedy is a similar tariff-based remedy.

Further, the Commission, in the first place, authorized submeterers to charge submetered residents up to the residential rate that end-users would pay were they direct metered utility customers. In authorizing the DPS to reduce the level of that rate cap when a submeterer has violated a utility's redistribution tariff (into which these regulations will be incorporated) is a reasonable exercise of the Department's authority as well.

We modified our proposed regulations after the April 2012 comments to provide further due process, adding procedural steps by which the Department provides Notice of Investigation, an opportunity to be heard, and written appeals to the Commission for submeterers who, solely due to their own behavior, become subject to the regulations' reduced rate cap remedy. The regulations specifically provide that a reduced rate cap will not be enforced until all appeals to the

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<sup>13</sup> See SAPA §202-b.

Commission have been exhausted. That being said, it is the Commission's primary intention to ensure compliance with submetering requirements rather than impose a reduced rate cap. In this vein, and in compliance with State Administrative Procedure Act §202-b, if a submeterer fully cures an alleged violation within 30 days after receiving a Notice of Investigation, the submeterer may avoid the imposition of a reduced rate cap altogether. Indeed, it is the Commission's primary objective to ensure that what appears to be a submetering violation is cured; as a practical matter, therefore, it will be only those submeterers who are flagrant in their abuse of the submetering requirements for whom a rate cap reduction of up to 40% will be required.

National Grid seeks clarification that utilities will not be expected to enforce violations of the submetering regulations.<sup>14</sup> The Department enforces our regulations. To the extent a utility provides service to submeterers, however, that service may be impacted by an order of which the utility will be given notice. Relatedly, the rules were amended to require that a master-metered customer seeking to submeter notify the distribution utility of the filing of a Notice or Petition (§96.5(g)). NG requests that submeterers also notify the utility after such approval is granted. This added notice is unnecessary for three reasons: (1) when the submeterer seeks authorization to submeter, the utility will be put on notice of the likely outcome of the Notice or Petition to submeter; (2) the utility is able to verify, if necessary, that the Commission has issued an order approving submetering by checking with the Department; and (3) if a utility affected by a petition or

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<sup>14</sup> NG (October comments) at 1.

notice becomes a party to the proceeding, the utility will automatically receive notice of a Commission order authorizing submetering.

The regulations reference the rate cap remedy in General Provisions to alert all submeterers that the remedy applies to them if they fail to abide by the rules and fail to cure such violations; §96.6 enunciates the procedural steps to enforce that remedy. REBNY comments that applying a penalty retroactively for up to two years will expose submeterers to significant financial liabilities, including the inability to pay either the utility or ESCO delivery and commodity services.<sup>15</sup> First, a two-year look back for refunds when necessary is supported by Commission and judicial precedent.<sup>16</sup> Second, the need for and decision to require a full two years of refunds will be based upon the circumstances of each case, including its impact on a submeterer's ability to continue to provide service. Finally, as previously stated, our primary intention is to ensure compliance with submetering requirements rather than impose a reduced rate cap.

#### Direct Metering to Submetering Conversions

Commenters ask that §96.2(b) be more specific as to what systems qualify as "an alternative, advanced energy efficiency design" warranting authorization to convert from direct metering to submetering.<sup>17</sup> Given the constantly improving technologies available to achieve energy efficiency, a Commission decree on any one such qualifying design would be

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<sup>15</sup> REBNY (October comments) at 3.

<sup>16</sup> See Glens Falls Communication v. Pub. Serv. Comm'n of State of N.Y., 239 A.D.2d 47, 51 (3<sup>rd</sup> Dept. 1998).

<sup>17</sup> NYC (October comments) at 4.

counter-productive. The fact that we are allowing direct metering to submetering conversions when, among other things, energy efficiency technologies have been applied may encourage further technologies as market demand for such products increases.<sup>18</sup> The Commission, however, must be able to review each petition under the circumstances at the time it is submitted. Therefore, the Commission should not be limited by a blanket approval, as commenters request, by stating in the regulations that submetering approval "shall" be granted in such conversions rather than "may" be granted.

AMPS comments that §§96.2(b) and 96.5(m) are infirm because premises owners who want to convert from direct metering to submetering should not be required to participate in or install energy efficiency measures. AMPS believes "the commission does not have the right to prevent consumers from obtaining a reduction in the cost for electricity" by adding requirements to a submetering conversion.<sup>19</sup> The Commission is not preventing submetering by including requirements that encourage energy efficiency in its approval of new submetering systems. Moreover, a need exists to balance the benefits to direct metered customers (e.g., the use of utility-owned meters and utility-provided consumer complaint handling) that will be lost against the benefits of submetering (e.g., the ability to participate in demand-response programs and possibly easier

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<sup>18</sup> NYC's suggested qualifying definition is acceptable as well, that an "alternative, advanced energy efficiency design shall include, but not be limited to, designs that incorporate energy efficient appliances and building-wide and unit-specific advanced insulation and lighting fixtures, such as those that meet industry-wide efficiency standards."

<sup>19</sup> AMPS (October comments) at 2.

transitions to smart metering) when a landlord seeks to replace existing direct metering.

PULP supports direct metering over submetering and comments that allowing conversions to submetering from direct metering actually limits customers' options, such as being able to choose green power or an ESCO supplier, in that submetering leaves the purchase of electricity up to landlords.<sup>20</sup> While submetering may limit an individual resident's choice of commodity supplier, we are convinced that submetering provides more opportunities to achieve, for example, demand reduction goals, than direct metering in a multi-unit premises. Further, submetering's ability to distribute energy to end-users behind the meter encourages on-site power generation, such as combined heat and power systems, which are integral to the state's energy plans.

The City of New York seeks to "clarify" that existing, directly metered condominiums and cooperatives intending to convert to master metered submetered installations are not required to demonstrate that the building or complex for which master metering with submetering is sought will participate in building level demand response programs or will employ on-site co-generation plant or an alternative, advanced energy efficiency design, to justify the conversion.<sup>21</sup> The regulations as written recognize the benefits of direct metering, which may, as a matter of policy, be offset at this time by the benefits derived from, for example, demand reduction goals that can best be achieved with submetering. Therefore, even condos and coops must be required to show participation in demand reduction programs or the installation of on-site generation or advanced

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<sup>20</sup> PULP (October comments) at 1.

<sup>21</sup> NYC (October comments) at 8.



energy efficiency systems to justify their conversion from direct metering to submetering.

Notices of Intent to Submeter and  
Petitions to Submeter - §96.3

The adopted rules create two approval processes, those for which a rebuttable presumption exists that submetering at the described premises is in the public interest and those requiring a further showing. For instance, a landlord submitting a Notice of Intent to Submeter (Notice) should only do so when (1) the premises is a master metered to submeter conversion or new construction and (2) when electric heat will not be submetered.

Our intent is to expedite Notices of Intent to Submeter by reducing the length of time it takes for these routine, non-controversial, applications to receive Commission authorization to submeter. Petitions to Submeter may also be expedited as long as landlords seeking to submeter comply with the specific requirements of Petition contents and make the showings that apply to their individual petition. Finally, the regulations essentially provide a checklist for the documents needed to comply with HEFPA; however, submeterers should rely on Public Service Law §§30-53 and HEFPA regulations to ensure compliance with HEFPA.

Notice to Residents

The notice to residents required in §96.3(c) is necessary to provide end-users affected by the transition to submetering an opportunity to comment. It creates a window of time in which notice must be provided to residents to learn about and respond to the proposal to submeter electricity. The notice is necessary because residents, in the past, have

provided useful information to us to assist in our determination to authorize submetering. To reduce confusion, however, we have removed the requirement in §96.3(c)(1) that landlords offer residents an opportunity to comment on a Notice or Petition as soon as the Notice or Petition goes before the Department since a case number has not yet been assigned and, therefore, the Petitioner does not know the dates by which residents can submit comments.<sup>22</sup>

In response to QL's request seeking advice on the type of notice expected, we have also specified that notice be provided to residents individually. Individual notice should not be burdensome in that landlords seeking to submeter can easily drop leaflets in mailboxes or at doors at the premises.

PULP comments that landlords authorized to submeter who wait five years to actually submeter should be required to provide additional notice to residents before they commence billing.<sup>23</sup> Section 96.3(e) need not be modified inasmuch as submeterers who wait five years after authorization to begin submetering must file a new Notice or Petition to Submeter. Since all Notices and Petitions to submeter require individual notice to residents (§§96.3[a][2], 96.3[b][1][ii], and 96.3[c]), submeterers are also required to provide notice of any new Notice or Petition. Moreover, an authorized submeterer who has not commenced submetered billing in close to, but less than, five years after authorization must still notify residents no more than two months before submetering will commence. Therefore, the regulations include adequate notice to end-users under all circumstances, including when a submeterer does not commence submetering immediately after Commission authorization.

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<sup>22</sup> QL (October comments) at 5.

<sup>23</sup> PULP (October comments) a 2.

PULP further comments that tenants be informed about their right to become a party to a submetering proceeding and the right to petition for rehearing after submetering authorization has been granted. The Commission's website currently includes information for submeterers and submetered residents; that site will be updated in the near future to include information identified by PULP.

NYSERDA suggests that the Commission's consideration of Notices of Intent to Submeter pursuant to §96.3(b), particularly regarding condominiums and cooperatives, should be conducted on an expedited basis to avoid delay in a submeterer's participation in NYSERDA's Advanced Submetering Program, which is necessary to meet the goals of the state's 42,000 MWH Energy Efficiency Portfolio Standard (EEPS).<sup>24</sup> A requirement exists that a submetering applicant include the Commission order authorizing submetering when seeking to participate in NYSERDA's advanced submetering technologies program.<sup>25</sup> The reason the regulations include a distinct Notice of Intent to Submeter is to recognize the value of expedited Commission review for routine submetering petitions. Where any premises owner submits a Notice of Intent to Submeter that is affected by, or affects, NYSERDA's EEPS program, such applicant should alert DPS Staff as such, which will help expedite such authorization to submeter. The NYSERDA program, however, is an insufficient basis to relieve condos and coops of the requirement that their submetering be authorized by Commission order. Such orders protect the end-users over the long term.

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<sup>24</sup> NYSERDA (October comments) at 1.

<sup>25</sup> Id.

Submetering in Cooperatives and Condominiums - §96.4

The Real Estate Board of New York continues to express concern that condos and coops be obligated to abide by the regulations (including HEFPA), the requirements for which are specified in §96.4. NYSERDA agrees, stating that ending the heretofore lightened regulation of condos and coops will cause delay and may discourage altogether condos and coops from submetering.<sup>26</sup> Since submetering regulations were first adopted in 1988, coops and condos were treated inconsistently in our regulations and were often left completely to internal processes to resolve complaints and billing problems. While the new regulations allow condos and coops to use the expedited Notice of Intent to Submeter process when possible and for which a presumption in favor of submetering exists, which is expected to lead to swift Commission action, coops and condos must still be held to statutory end-user protections. This is necessary, in large part, because coops and condos house residential customers who are entitled to HEFPA protections and often include rental units managed by the original premises owner living among the coop and condo owners and shareholders. Those renters do not have the same remedies as coop and condo owners and shareholders if submetering becomes problematic. Therefore, we are not carving out exceptions for coops and condos.

Notice and Petition Contents - §96.5

Section 96.5 is a comprehensive list of Notice and Petition contents that must be made part of submetering applications. Its location here is intended to provide submetering applicants accessibility in one place to Notice and

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<sup>26</sup> NYSERDA (October comments) at 2.

Petition requirements, which have been developed piecemeal in the last 30 years.

Specifically, AMPS asks that the requirement that refrigerators in rental units meet the most recent federal energy efficiency standard or be no more than ten years old be removed (§96.5[h]). AMPS argues the requirement is an unfair burden on landlords and, if any refrigerator replacement requirement remains in the final regulations, the standard should be set at 15, not ten, years. AMPS suggests instead that we allow tenants the option to replace appliances to more efficient ones. We will not adopt AMPS' suggestions. Other than when electric heat is submetered, refrigerators are likely the most expensive component of a submetered electric bill. Further, once landlords have transferred the responsibility for electric charges to tenants, their incentive to install electricity conserving equipment within each dwelling unit diminishes or is even eliminated. The requirement that landlords replace refrigerators provides the last best chance that landlords will make the necessary investments in energy efficiency. Commission orders authorizing submetering have for some time included the refrigerator replacement requirement and no submeterer has judicially challenged those orders, which supports a finding that the requirement is not overly burdensome. In comparison, for instance, coop and condo owners and shareholders, do have an incentive to purchase an energy efficient refrigerator, the cost for which they will recoup in lower electric bills over the long run. This is why the refrigerator replacement requirement applies only to rental units.

On a related note, QL claims that the notice, refrigerator replacement, energy audit, and energy education

requirements do not create parity between landlords and distribution utilities and have no rational basis because they will be too expensive for landlords.<sup>27</sup> First, landlords have a financial incentive to transfer to residents as many costs as possible. Requiring energy efficiency measures mitigates that impact on residents. QL's claim that this is an imbalance as compared to distribution utilities makes no sense because utilities have no such incentive. Second, the cost to replace refrigerators is only required if current refrigerators are more than ten years old at the time the submeterer seeks Commission authorization to submeter and every submetering petitioner has met this condition in the last two years. Finally, not only are refrigerator replacements one of the costs for which landlords may seek assistance from NYSERDA, but arguments that landlords cannot afford more efficient refrigerators have not been supported in the record.

QL comments that the requirement that submetering applicants "describe" the energy efficiency measures that have been or will be installed should not be required because describing planned energy efficiency measures poses unnecessary financial burdens on owners (§96.5(i)).<sup>28</sup> It may be that submetering is the first energy efficiency step a landlord takes, as QL states. But it should not be their last and it likely will not be their last if, as is sometimes the case, landlords are receiving NYSERDA funding to install submeters. NYSERDA programs that assist with submetering costs usually include a requirement that other energy efficiency improvements be made. QL's claim that a description of a landlord's energy

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<sup>27</sup> QL (October comments) at 6-7.

<sup>28</sup> QL (October comments) at 5.

efficiency plan in a Notice or Petition to Submeter is burdensome is belied by past Commission experience, wherein landlords have been able to provide this information, have been willing to implement energy efficiency measures, and have been partially compensated for some energy efficiency measures through the existence of NYSERDA programs that assist landlords in such transactions.

On the other hand, PULP criticizes the regulations for allowing submetering in electrically-heated premises at all, regardless of the energy efficiency measures, because landlords who own energy inefficient buildings simply transfer their high energy costs due to structural building inefficiencies to tenants without sufficient customer safeguards.<sup>29</sup> Submetering electric heat creates a strong incentive to conserve its use; therefore, we will not prohibit it. The regulations balance the competing interests of submeterers and residents of submetered premises when electric heat is submetered. On the one hand, submeterers may seek cost recovery from NYSERDA or their utility for some energy efficiency measures (which will ultimately assist residents), including the submeters themselves. On the other hand, residents receive energy efficiency education and some energy improvements to reduce their costs.

QL seeks "clarification" of the requirement that landlords provide added energy efficiency information to tenants with "above-average electricity usage."<sup>30</sup> The landlord should review monthly apartment-level electricity usage data and identify, for each apartment size, the tenants that are using more than the average amount of electricity. The submeterer

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<sup>29</sup> PULP (October comments) at 3.

<sup>30</sup> QL (October comments) at 5.

should provide information to those residents on measures such residents can take to reduce energy consumption.<sup>31</sup>

NYSERDA and PULP express concerns about §96.5(1), which describes added measures required when a submetering applicant seeks to submeter electric heat. NYSERDA suggests that instead of offering submeterers the option of providing the Commission one year of shadow bills, landlords should be able to install two submeters and then, in essence, residents will not pay for the exact amount of heat used, but instead would pay a surcharge if they use heat over a certain threshold.<sup>32</sup> NYSERDA's suggestion, while creative, does not allow residents to benefit completely or directly from their own conservation efforts. Moreover, the regulations do not require shadow bills, but include the option that a landlord provide a usage survey from an already existing, similar, submetered premises.

The regulations attempt to balance the competing interests of providing end-user price signals necessary to encourage conservation and those of landlords who seek to pass onto residents the costs of electric usage. Therefore, while HEAP may not reimburse end-users for the cost of "blowers" that,

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<sup>31</sup> This is consistent with recent Commission Orders authorizing submetering. See e.g. Case 12-E-0076, Petition of Lafayette-Boynton Apartment Corporation to Submeter Electricity at 825 and 875 Boynton Avenue and 820 and 880 Colgate Avenue, Bronx, New York, Located in the territory of Consolidated Edison Company of New York, Inc., Order Approving Submetering Subject to Conditions (issued and effective September 24, 2012) at 4 ["The Owner has also agreed to provide to the tenants, along with the notice that submetering will be implemented, a brochure on energy efficiency measures tenants can implement to reduce energy usage. In each of the first three months after submetering has been implemented, the Owner will again provide such information to tenants in each apartment in which the electricity charge exceeds the rent adjustment"].

<sup>32</sup> NYSERDA (October comments) at 2, fn. 2.



PULP claims, are required to circulate warm air, other government programs do provide utility allowances to assist in the payment of electric charges.<sup>33</sup> Moreover, PULP has not provided in sufficient detail the extent of or cost to operate blowers. At the same time, the regulatory requirements placed upon landlords to provide energy efficiency education, installation of the most efficient refrigerators available, and other premises improvements that will reduce end-users' electric costs, work together to minimize the costs end-users will assume once submetering in an electric heated premises is authorized and encourage end-users to conserve electricity with the price signals submetering provides.

QL argues that no statutory basis exists for the requirement in the regulations that 60% of residents whose heat is submetered be better off after submetering, also known as the "Financial Harm Test" (§96.5[1]).<sup>34</sup> The Commission first developed and applied the concept of a "Financial Harm Test" in four recent submetering cases.<sup>35</sup> In those orders, the Commission allowed four complexes to begin submetering if the owners could show that at least 50% of the residents would benefit or remain neutral after the submetering of their electric heat.<sup>36</sup> As a result of those cases, the Commission recognized that a higher baseline percentage of tenants benefitting when a building converts to submetered electric heat is necessary to ensure that 50% will in fact benefit or remain neutral.

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<sup>33</sup> PULP (October comments) at 3, fn. 7.

<sup>34</sup> QL (October comments) at 6.

<sup>35</sup> Cases 08-E-0836, 08-E-0837, 08-E-0838, and 08-E-0839 -- Petitions to Submeter Electricity.

<sup>36</sup> Those authorizations are not disturbed by the adoption of the regulations' stricter requirements for future submetering petitions.

Because landlords could not forecast definitive annual financial impacts on low income customers, we are increasing the baseline percentage to 60% to recognize the likelihood of inaccuracies in the projected estimates used in such forecasts. The 60% baseline creates far more certainty that the majority of ratepayers will in fact benefit or remain neutral by providing a necessary margin to achieve our original goal that 50% would benefit.

That being said, the rules expand the options for landlords as well by allowing them to submit actual data from similarly situated premises that shows the impact of submetering on end-users who are already submetered. This option avoids requiring landlords to invest in their own submetering equipment prior to Commission authorization for sole purpose of accumulating one year of shadow bills to show the premises meets the Financial Harm Test.

In any event, the Commission's authority to establish the Financial Harm Test is found in Public Service Law §65, which assigns to the Commission the obligation to ensure safe and adequate electric service. If no such oversight existed when electric heat is submetered, the financial burden on end-users could be sudden, extreme, and unfair. Therefore, when electric heat will be submetered, the regulations require that landlords satisfy the Financial Harm Test and educate residents to avoid undue financial impacts on those residents who have fewer residential alternatives and when governmental programs do not remain current on reimbursing costs for energy usage. Doing so strikes a necessary balance between the environmental and energy efficiency benefits of submetering (in that end-users are shown to use less electricity when they are provided price signals) and landlord benefits of cost savings, against the

financial, day-to-day, impact of monthly electric heat bills through submetering on residents who receive housing assistance.

QL comments that §96.5(n) is burdensome and vague.<sup>37</sup> This section requires that the content of a Notice or Petition to the Commission include information "which, in an order issued prior to the date on which such Notice of Intent or Petition to Submeter is filed, the Commission shall have identified as necessary . . ." The purpose of §96.5(n) is simply to recognize that submetering industry expansion and technological improvements may require Commission action, while avoiding a rewrite of these regulations. The fact that any new filing requirements will have been enacted by Commission order after notice and an opportunity to be heard belies QL's premature claim that they are burdensome. Until future Commission orders, if any, are issued, submetering applicants must only comply with the required content list in the regulations.

Submetering Service Conditions - §96.6

Section 96.6 is the heart of the new regulatory scheme for current and future submeterers. Common sense will dictate when a specific condition applies. For instance, the condition that submetering,

shall be in accordance with, as applicable, the Notice of Intent to Submeter, the Petition to Submeter, or similar filings made prior to the effective date of this Part, as authorized by the Commission or as modified by conditions adopted by the Commission as part of its review and approval,

(§96.6[a]), is best described as the most fundamental, common sense, service condition for all submeterers. As it applies to new submetering applicants, the condition requires that to

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<sup>37</sup> QL (October comments) at 6.

obtain and retain the right to redistribute electricity through the utility tariffs, submeterers are obligated to abide by all of the commitments made in their Notice of Intent to Submeter or Petition to Submeter. Similarly, for submeterers who are currently authorized to submeter, the commitments submeterers made in their petition upon which the Commission authorized them to submeter shall be deemed conditions with which the submeterer must abide to continue to submeter. Most of the §96.6 service conditions are currently in effect and apply to all submeterers by virtue of prior Commission orders or authorizations so should come as no surprise to submeterers.

The conditions that appear new are necessary for submeterers to comply with HEFPA or necessary for the Department to enforce HEFPA. For instance, the need to update the Submeterer Identification Form when necessary provides the Department accurate contact information in resolving consumer complaints (§96.6[i]); removing from leases the requirement of binding arbitration to resolve customer disputes is necessary to ensure that submeterers follow HEFPA, which assigns to the DPS consumer complaint handling in all future consumer complaints. §96.6(g).

#### Service Termination

One residential electric submetering service condition that received many comments is the requirement that submeters be capable of service termination by a future date. The requirement of service termination best aligns submetering with the service provided to direct metered customers. In response to industry comments, however, the draft regulations have been amended to require that submetering systems installed after 2016 must be capable of service termination to individual units. As

such, §96.5(a) now requires that Notices and Petitions filed after 2016 include documentation showing that the submetering systems to be installed will be capable of service termination to individual units. Based upon comments received, we anticipate that between now and 2016, the submetering industry will develop additional submetering systems that allow for service termination. Even without the option of service termination, now or in the future, residents in submetered premises are entitled to, and submeterers are obligated to show they have provided, all of the protections HEFPA prescribes -- identification of elderly, blind and disabled customers, and the offer of deferred payment agreements and budget billing plans, among other things -- before any civil remedy is enforced for failure to pay electric charges.<sup>38</sup> For submetering systems installed after 2016, all HEFPA protections, including notice of service termination timeframes, shall be provided prior to service termination.

The regulatory intent of the service termination requirement is not to require that landlords immediately replace or install submetering systems capable of service termination. In the comments received, the submetering industry states that due to the manner in which submetering systems have been developed, even gradual replacement (i.e., as one submeter fails, it is replaced with one capable of service termination) is not possible. For this reason, and given the technological challenges of an industry-wide transition to submetering systems that allow for service termination, we are altering the requirement that new submetering systems be capable of service termination by allowing the industry three years to further

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<sup>38</sup> See e.g. Brooklyn Union Gas Co. v. Richy, 123 Misc. 2d 802 (Kings County 1984).

develop the technology.<sup>39</sup> That being said, having approved many petitions to submeter in recent years that include the installation of submeters capable of service termination, we have been assured that submetering systems exist that are capable of service termination and that submeterers often prefer them.<sup>40</sup> Therefore, we know the remedy of service termination is possible and encourage, where feasible, the installation of such submetering systems before the 2016 deadline.

Aside from the technological limitations of service terminations in submetering, the City of New York claims that the service termination requirement could conflict with established landlord/tenant law.<sup>41</sup> Having offered no citations in either set of comments to support or explore this claim, the City suggests that HEFPA "may violate the spirit" of Real Property Law §235-b, which creates a statutory right of habitability for all tenants; NYC seeks guidance on the interplay of HEFPA and Real Property Law.

The application of HEFPA to submetered services undoubtedly has affected and will affect future litigation of civil remedies between landlords and tenants when electric charges go unpaid. Once submeterers became subject to HEFPA, however, submetered end-users became entitled to HEFPA's protections and the two areas of law -- Real Property Law and

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<sup>39</sup> Some commenters state that end-users will complain about the installation of larger or more complex submeters, which will disrupt added wall space during installation. Since the added safeguards that coincide with service termination as a remedy will inure to the residents themselves, submetering companies will have to explain this during any installation inconvenience.

<sup>40</sup> See e.g. Cases 12-E-0460, 12-E-0076, 10-E-0606, 10-E-0489, 10-E-0338, 10-E-0107, 09-E-0779, 09-E-0519, and 07-E-1015.

<sup>41</sup> NYC (April comments) at 13; QL (October comments) at 6.

the Public Service Law and regulations -- must be reconciled.<sup>42</sup> While HEFPA's protections were written to balance the harm associated with service termination and the utilities' need to collect utility charges, HEFPA's purpose includes "the preservation of health and general welfare." PSL §30. It is in that vein that we treat submeterers like utilities when submeterers are owed electric charges and require that service termination, rather than special proceedings, be the remedy sought when a submetered end-user fails to pay electric charges.

Some commenters state that submeters that are technically capable of service termination would be an "economic burden" and create safety issues.<sup>43</sup> Throughout this regulatory proceeding, DPS has sought actual data on submeterers' costs and profits to no avail. The absence of record information demonstrating the new requirements are cost-prohibitive fails to convince the Commission that regulatory requirements should be lessened. They are (1) required to implement HEFPA; (2) necessary to assist the DPS complaint handling process; (3) otherwise necessary for the health and welfare of submetered end-users; and (4) create a mechanism to enforce the conditions required of this service classification. While perhaps more expensive than submeters not capable of service termination,

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<sup>42</sup> Application of each body of law will continue to overlap at least until submetering service termination is applied industry-wide. That is, HEFPA's entire statutory scheme is framed around service termination as a remedy. Therefore, when it is not possible to apply the more consumer-friendly procedures such as a seven-day termination notice and due diligent contacts before a service termination, a landlord will continue to seek remedies in civil court, where Real Property Law's civil procedures apply. HEFPA's better protections for electric end-users, however, should prevail in the long run.

<sup>43</sup> AMPS (October comments) at 2.

advanced submetering systems that allow for service termination are on the market, submeterers are installing them, and the new regulatory requirements will no doubt stimulate further development.

We are working within the parameters of HEFPA in ordering that other civil remedies not be enforceable (1) until all HEFPA protections have been provided in instances where submetered systems are not capable of service termination and (2) once submetering systems are installed after 2016 that are capable of service termination. In response to those who claim service termination in multi-unit premises can be unsafe, we note that (1) direct metered residents who live in multi-unit premises have had their utility electric service terminated without event for many years; (2) in complying with HEFPA, landlords will be made aware, through medical emergency and Elderly, Blind and Disabled forms of those residents in need of extra attention at termination; (3) service termination with HEFPA's protections is safer than an individual's need to locate new housing.

Courts have held that cost recovery claims arising from residential leases that are unrelated to rent or are called "additional rent" cannot be maintained in a landlord proceeding against a tenant for nonpayment. It is only leases that define electric charges as "additional rent" that can be used by a landlord to retake possession of leased premises.<sup>44</sup> Therefore, in this order, we determine that when a premises is submetered, electric charges may not be treated by the submeterer as "additional rent."

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<sup>44</sup> See Matter of Binghamton Hous. Auth. v Douglas, 217 A.D.2d 897 [3rd Dept 1995] [landlord may seek judgment for money owed for rent in summary proceeding, but "not other charges"].



Commenters also state that the need to enter an apartment to terminate service could put landlords at risk of tenant reprisal.<sup>45</sup> Utilities, however, have implemented procedures to gain access to homes to terminate utility service at the meter; landlords will have to do the same. HEFPA's extensive notice requirements prior to service termination will help in that regard as will landlord offers of deferred payment agreements and budget billing mechanisms to assuage tenants' possible frustration with the situation. Moreover, leases will likely have to be modified to state, when necessary, that landlords will be authorized to enter apartments to access the submeter when electric charges have not been paid and after the landlord has followed HEFPA procedures.

In our view, a landlord's comprehensive application of the procedural protections in HEFPA provides landlords a complete defense against a tenant's claim of constructive eviction when electric service has been terminated due to unpaid submetered electric charges. That is, if a tenant, after failing to pay the electric bill, claims a Real Property Law §235-b breach of habitability, courts will look at "[e]ach case . . . on its own," and are unlikely to credit a submetered resident's claim that RPL §235-b has been violated as long as the submetering landlord has followed HEFPA. Notably, HEFPA's

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<sup>45</sup> REBNY (October comments) at 2; QL (October comments) at 3.

protections include not shutting off service while a tenant complaint is pending with the submeterer or at DPS.<sup>46</sup>

Some industry representatives have commented that landlord/tenant disputes have not been a device submeterers have used to enforce payment for electric charges.<sup>47</sup> The Department's Office of Consumer Services, however, has intervened in judicial proceedings on behalf of submetered end-users whose landlords were attempting to use a failure to pay electric charges as the basis for special proceedings.

#### Interest on Overcharges

Clarification was sought as to the amount of interest that may be required on credits for overcharges after hearing.<sup>48</sup> Consistent with HEFPA, interest paid on overcharges shall be in compliance with PSL §118 and 16 NYCRR §145.3.

#### Shared Metering

By definition, Public Service Law §52, and its extensive penalties available against multi-unit premises owners when they charge one customer for the electric usage of a third-party or common areas in a multi-unit building, does not apply

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<sup>46</sup> See Suarez v. Rivercross Tenants' Corp., 107 Misc. 2d 135 (1<sup>st</sup> Dept. 1981); see also L. 1975, Ch 597, NY Legis. Ann, 1975, p. 437, Governor's statement [RPL §235-b intended to remedy inequities]. Real Property Law §235-b, which establishes a statutory Warranty of Habitability, states, inter alia, "When any such condition [alleged to violate the warranty of habitability] has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties." On its face, therefore, the statute protects a landlord when it is the tenant's failure to pay electric charges that leads to service termination.

<sup>47</sup> QL (October comments) at 6.

<sup>48</sup> Id.

to submetering.<sup>49</sup> The policy behind Public Service Law §52, however, should apply whenever an end-user is charged for their electric usage. That is, any end-user should not be charged nor forced to pay for another's electric usage without their written authorization to do so. In the spirit of §52, therefore, the proposed regulations require that a submetered premises not have any cross-wiring conditions.

Commenters are concerned with this requirement because, QL claims, a submeterer cannot attest to or affirm that cross-wiring does not exist at submetered premises and can only attest to using good-faith efforts to avoid the problem. The point of this condition in the regulations is to alert submeterers that such conditions are not authorized and that a consumer complaint about a shared metering condition, if one exists, may result in, at least, a bill credit with interest.

#### Submetering Equipment Requirements - §96.7

QL seeks clarification that some of the ANSI C-12 requirements referred to in 16 NYCRR Parts 92 and 93, such as environmental tests and/or outdoor requirements, do not apply to submeters. QL does, however, support the ANSI-based accuracy standards for submetering and notes that digital submeters are different from utility meters and use external current transformers (CTs), which makes two ANSI standards applicable - one which applies to the meter and one to the CT.<sup>50</sup> Submeters must comply with only the applicable parts of Parts 92 and 93.

BC seeks "clarification" of §96.7(a)(2) and the location requirements for submeters. While providing the

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<sup>49</sup> PSL §52's definition of "shared meter" means "utility meter." PSL §52(1)(b).

<sup>50</sup> QL (October comments) at 6.

ability to view a submeter does not mean submeterers must place submeters inside each dwelling unit, it does mean submeterers, when asked, must allow a resident access to view their own submeter. If such submeters are locked, the submeterer needs to arrange for customer access. The final rules expand the requirement that submetered end-users be capable of actually seeing their submeter by allowing for computerized access. This creates another alternative to provide end-users the opportunity to confirm accurate billing.

AMPS adds that Parts 92 and 93 provide protocols for meter testing and the regulations change those protocols. QL asks that rather than state that a "statistically significant sample" of meters be tested that the regulations specify that 8% be tested annually. We are not changing §96.7(b) to state that "at least 8% of submeters" be tested annually. Parts 92 and 93, which apply to the meters used by distribution utilities, are incorporated by reference into these regulations and have been in effect for many years; therefore, they will be enforced as written. In a related matter, AMPS asks, due to the cost, that it be left up to the discretion of the submeterer when to retest a submeter if a meter's historic data supports it is operating accurately.<sup>51</sup> Here again, Parts 92 and 93 address meter testing; we will not develop separate protocols to apply to submeters.

The regulations reasonably spread the cost of submeter testing among submeterers and end-users. If billing cannot be reconciled, the next logical step is to make certain a submeter is registering accurately. However, the cost of this test is borne by the submeterer only when a customer has submitted a written complaint and, therefore, has some basis for asserting a billing error. After one complaint, a customer who repeatedly

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<sup>51</sup> AMPS (October comments) at 3.

complains risks paying for any submeter test that shows the submeter is working within the required parameters. If the submeter is not working accurately, the submeterer should replace the broken submeter rather than continually paying for submeter tests.

Enforcement - §96.8

The Department's need to enforce the submetering regulations cannot be overstated. The administrative remedies in §96.8 provide notice, an opportunity to be heard, and a cure period before any monetary impact on a submeterer is required. That said, it is the Commission's primary goal to ensure that submeterers follow the rules. We will not extend the time to appeal a Notice of Rate Cap Reduction in §96.8(c) to 30 days, as QL suggests, because a 15 day appeal period is consistent with 16 NYCRR §§4.7 (Commission's Rules of Procedure) and 12.13 (Consumer Appeals).

Miscellaneous Comments

MOM, a tenant-based group that advocates for low income households, opposes the regulations as too cumbersome and comments that because submetering is "made possible" through smart meters, asks that a definition of smart meters be included in the regulations. While some submeterers may use smart meters, submeters are not always smart meters. Therefore, what the Commission seeks to achieve in these regulations is not impacted directly by a smart meter program.

MOM further suggests that the regulations should benefit low income submetered residents. The intent of the regulations is to protect low income end-users by: codifying the application of HEFPA (which was enacted in part to assist bill-

challenged end-users) to submeterers, ensure that electric charges are not treated as rent so that end-users have DPS-monitored complaint procedures; require replacement of refrigerators, which are the highest cost to end-users; and the requirement that submeterers report the efficiency measures installed or that will be installed, all of which either reduce electric charges or provide a mechanism to dispute overcharges. These and other sections of the submetering regulations directly assist all submetered residents, including those that are low income.

Housing Assistance Programs

As these submetering regulations are implemented, they may, in some respects, conflict with other government programs that provide supplemental housing and utility assistance to residents of submetered units. The specifications and requirements of governmental housing and utility assistance programs must be reconciled on a case-by-case basis and we do not purport to preempt such requirements in this order.

CONCLUSION

The views of all the stakeholders have been taken into account in developing the attached regulations. The accompanying resolution and the resulting regulations, as set forth in the accompanying resolution, are adopted.

By the Commission,

(SIGNED)

JEFFREY C. COHEN  
Acting Secretary

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on December 13, 2012

COMMISSIONERS PRESENT:

Garry A. Brown, Chairman  
Patricia L. Acampora  
Maureen F. Harris  
James L. Larocca  
Gregg C. Sayre

CASE 11-M-0710 - In the Matter of Reviewing and Amending the  
Electric Submetering Regulations, 16 NYCRR  
Part 96.

RESOLUTION BY THE COMMISSION

(Issued and Effective December 18, 2012)

Statutory Authority:

Public Service Law §§ 4, 30-53, 65 and 66.

RESOLVED:

1. That the provisions of §202(1) of the State  
Administrative Procedure Act and §101-a(2) of the Executive Law  
have been complied with.

2. The official Compilation of Codes, Rules and Regulations  
of the State of New York, Title 16, Public Service, Part 96, is  
amended. Such amendments are effective upon publication of a  
Notice of Adoption in the State Register, by the repeal of Part  
96 of Chapter 16 and the addition of a new Part 96 to read as  
set forth in the Appendix attached hereto.

3. That the Secretary to the Commission is directed to file  
a copy of this resolution with the Secretary of State.

4. That affected public utility companies shall submit updated tariff leaves upon the effective date of the amended 16 NYCRR Part 96.

By the Public Service  
Commission of the State of  
New York

(SIGNED)

JEFFREY C. COHEN  
Acting Secretary



TITLE 16. DEPARTMENT OF PUBLIC SERVICE  
CHAPTER II. ELECTRIC UTILITIES

PART 96. RESIDENTIAL ELECTRIC SUBMETERING  
(Statutory authority: Public Service Law §§4, 53, 65 and 66)

§ 96.1 Definitions - The following definitions apply for purposes of this Part:

- (a) Assisted Living Facilities - Multi-unit residential premises, identified as assisted living facilities and certified by the New York State Department of Health as such, which provide congregate residential housing with supportive services, including on-site monitoring, and personal care services and/or home care services in a homelike setting.
- (b) Campground, recreational trailer park, marinas, and parking facilities - facilities for use on an intermittent, temporary, or irregular basis by campground, recreational, trailer park, marina, or vehicle charging stations where electric service is delivered by the utility to the facility owner and redistributed to individual campsites, trailers, boats or plug-in electric vehicle charging stations with or without submetering.
- (c) Condominium - Separate ownership of individual units in a multi-unit residential premises. Each unit owner holds title to a unit of real property and also owns a common tenancy with owners of other units for the common areas of the building, which are managed by a homeowners' association, or as established in the condominium bylaws.
- (d) Cooperative Apartment - Multi-unit residential premises in which residents own a share in the corporation that owns the real estate, which entitles the shareholder to occupy a dwelling unit. Each shareholder is granted the right to occupy one housing unit through an occupancy agreement, which is similar to a lease. A board of directors manages the cooperative.
- (e) Direct metering - in multi-unit residential premises, the measurement of electricity use in each unit through a meter that has been provided by the distribution utility company, wherein each individual residential unit is assigned its own meter.
- (f) Electric heating - Heat provided to an entire living space with electricity primarily by means of non-portable electric heating appliances.
- (g) HEFPA - The Home Energy Fair Practices Act, Public Service Law §§30-53 and all Commission regulations adopted to implement such provisions.
- (h) Master-metering – the measurement through a single meter of the quantity of electricity delivered to a multi-unit residential premises by a utility, wherein the owner or manager of such building is the utility customer and wherein the electricity may be redistributed to the individual residential units in the building either with or without submetering.
- (i) Rate cap – the maximum rate, calculated in each billing period, that may be used to compute the charges for electric service to a submetered resident. Unless a different rate cap is set pursuant to § 96.2(a) and § 96.8(b) and (c) of this Part, the rate cap shall

be the rates and charges of the distribution utility for delivery and commodity in that billing period to similarly situated, direct metered residential customers. Where residents are billed for time-of-use, the maximum rate for purposes of calculating the rate cap shall be the average annual residential rate.

- (j) Resident – the occupant of a unit used as a home in a multi-unit residential premises.
- (k) Senior Living Facility - Multi-unit residential premises in which energy-efficient housing and other services are provided, and will be provided in the future, to resident senior citizens, in which electric usage does not vary significantly from unit to unit because units are uniform in size and in the types of appliances, and which promotes economic development.
- (l) Submeterer – any multi-unit residential premises owner or utility customer of record who purchases electricity for delivery by the utility to the premises and facilitates the sale or redistribution of such electricity for use by the premises occupants whose units are separately metered and billed based on the measurement of electricity use in each occupant’s unit. Any entity acting on behalf of such owner that arranges for the installation of submeters and the billing of submetered usage to individual residents shall be considered the agent of the submeterer. The submeterer may engage the services of a submetering service provider to install meters, read meters and/or handle billing.
- (m) Submetering – a system of measuring electricity use in a residential unit in a master-metered multi-unit residential premises, or campground, trailer park, marina or parking facility by means of a submeter installed on the wiring to each residential unit, campsite, trailer, boat hookup or plug-in electric vehicle charging station.
- (n) Time-of-use rates – the pricing of electricity based on actual usage during particular time intervals. Time-of-use rates may be applicable to blocks of time over a 24 hour period.
- (o) Time-of-use meter – a meter that registers accumulated energy consumption (data) over specific time intervals.
- (p) Utility customer – for purposes of this Part, an electricity consumer whose use of electricity is directly metered by the distribution utility and is a customer of record of the distribution utility.

## § 96.2 Electric Service to Submetered Multi-unit Residential Premises - General Provisions.

- (a) Provisions Applicable to all Submetering.
- (1) Electric service shall only be provided to a multi-unit residential premises in which individual dwelling units in the premises receive submetered electric service if the submetering (a) is and continues to be authorized by Commission order where a Commission order was necessary, (b) is and continues to be consistent with any conditions imposed by such order, and (c) is and continues to be consistent with this Part notwithstanding previous authorization to submeter that did not include the requirements herein.
  - (2) If electric service is provided to a multi-unit residential premises in which the individual dwelling units in such premises receive submetered electric service, but which, after the procedures provided for in §96.8(b) and (c), has been found to be (a) inconsistent with any conditions imposed by the Commission's order authorizing such service, or (b) inconsistent with applicable provisions of this Part, the rate cap for such service may be reduced by up to 40%. The rate cap will continue at such reduced level from the date specified in the Notice of Rate Cap Reduction until such time as the Department confirms to the submeterer that such inconsistency has been corrected. Further, when such inconsistency existed for a period of time prior to the Department's Notice of Alleged Violation, contained in §96.8, the reduced rate cap may be extended to all or a portion of such period, not exceeding two years, and the submeterer shall refund to residents the difference between the reduced rate cap established for that period pursuant to this paragraph and any charges for electric service paid by residents in such period. A rate cap reduction made pursuant to this section is appealable to the Commission within 15 days of the date of the Notice of Rate Cap Reduction.
- (b) Existing Direct Metered Multi-unit Residential Premises. Except as otherwise provided in this Part, electric service provided to individual residential units in existing multi-unit residential premises through direct metering may not be discontinued or replaced by master metering. If, however, a Petition to Submeter is filed, which (1) complies with the applicable requirements of §96.5 and §96.6; (2) seeks to convert such premises from direct metering to master-metering with submetering; and (3) demonstrates that the building or complex for which master metering with submetering is sought will participate in building level demand response programs or will employ on-site co-generation plant or an alternative, advanced energy efficiency design, the conversion to submetering may be authorized by the Commission.
- (c) Assisted Living and Senior Living Facilities. Electric service is authorized to be established or continued to assisted living or senior living facilities through master metering.
- (d) Campgrounds, Recreational Trailer Parks, Marinas, and Parking Facilities. Electric service may be provided to the facility owner or operator of campgrounds, recreational trailer parks, marinas and parking facilities for redistribution to individual campsites, trailer, boat hookups, or plug-in electric vehicle charging stations with or without submetering. Master metering and submetering, at the facility owner's or operator's

option, may be installed and used for billing without Commission approval and are not subject to submetering service conditions.

§ 96.3 Filings Seeking Authorization to Convert Existing Master-metered Residential Rental Premises to Submetering and Submetering in New Premises.

(e) Notice of Intent to Submeter.

Except when a conversion to submetering results in the cost of electric heat becoming the responsibility of the residents or when a building owner seeks authorization to install submetering in place of direct metering pursuant to §§96.2(b), a master-metered multi-unit residential rental premises with submetering shall be authorized:

- (1) after filing a Notice of Intent to Submeter, which includes the information, descriptions, plans, forms, certifications, and other materials and representations specified for such Notices in §96.5 of this Part;
- (2) after individual notices to residents are provided pursuant to §96.3(c);
- (3) upon the Commission's determination and order approving such submetering as in the public interest and consistent with the provision of safe and adequate electric service to residents. In making this determination, the Commission may rely on the Notice of Intent to Submeter and the information therein, when complete, as a rebuttable presumption that submetering at such premises is in the public interest and consistent with the provision of safe and adequate service to residents.

(f) Petition to Submeter.

- (1) When payment for electricity for electric heat will become the responsibility of residents, submetering will be authorized:
  - (i) after filing a Petition to Submeter which includes the information, descriptions, plans, forms, certifications, and other materials and representations specified for such Petitions in §96.5 of this Part;
  - (ii) after individual notices to residents are provided pursuant to §96.3(c) where necessary; and
  - (iii) upon the Commission's determination and order approving such submetering as in the public interest and consistent with the provision of safe and adequate electric service to residents. Such determinations will be considered by the Commission on a case-by-case basis. In making such determination, the Commission may rely on the Petition to Submeter, supplemental information provided with the Petition, information supplied in public comments, and staff's investigation.
- (2) Replacement of direct metering with submetering shall be authorized:
  - (i) after filing a Petition to Submeter which includes the information required by §96.5 of this Part and the demonstration described in §96.2(b);
  - (ii) after individual notices to residents are provided pursuant to §96.3(c); and

- (iii) upon the Commission's determination and order approving such submetering as in the public interest and consistent with the provision of safe and adequate electric service to residents. Such determinations will be considered by the Commission on a case-by-case basis. In making such determination, the Commission may rely on the Petition to Submeter, supplemental information provided with the Petition, information supplied in public comments, and staff's investigation.
- (g) The following notice to residents is required for conversions to submeter. The submeterer shall provide or shall have provided proof, in the form of a sworn affidavit, that the following individual, written notices have been provided to all current residents:
- (1) Prior to Filing a Notice of Intent to Submeter or a Petition to Submeter pursuant to this Part. Prior to submitting a Notice of Intent to Submeter or a Petition to Submeter, the prospective submeterer identified in such Notice or Petition shall provide individual notice to current residents of the prospective submeterer's intent to submit a Notice of Intent to Submeter or Petition to Submeter. Such notification to residents shall include the identification of a location in the premises where, and at times convenient to the residents, the information required to be provided to the Commission under §96.5 may be reviewed by residents. Such notification shall also include an offer to provide, upon request by a resident, a copy of such Notice or Petition.
  - (2) Prior to Approval. A Notice of Intent to Submeter or Petition to Submeter filed pursuant to §96.3 shall not be noticed for comment in the New York State Register until all information required in §96.5 in connection with such Notice or Petition is filed with the Secretary. Immediately upon publication of the Notice of Intent to Submeter or Petition to Submeter in the State Register, the prospective submeterer shall inform current residents individually that the Commission has commenced a proceeding and how they may submit comments to the Department of Public Service within the State Administrative Procedure Act comment period.
  - (3) After Submetering Approval. After submetering is authorized pursuant to this Part, the submeterer shall notify residents individually no less than 2 months prior to the actual commencement of billing for submetered electric service. The submeterer shall file with the Secretary a copy of the notice provided to current residents of the date upon which submetering will commence. Such required notice shall include:
    - (i) a statement indicating that prospective residents will be notified prior to signing a lease or purchase agreement that electricity will be supplied on a submetered basis and the residents will be responsible for electric charges;
    - (ii) a copy of the annual notice used or to be used for compliance with PSL §44, which summarizes the residents' HEFPA rights and responsibilities, including complaint handling procedures; and
    - (iii) the precise manner in which submetered residents may contact the Department of Public Service Office of Consumer Services.

- (d) The submeterer shall commit in writing to accept all of the conditions required by the Commission in its order authorizing submetering and in these regulations.
- (e) Submeters shall be installed and submetered billing shall commence within five years of the Commission order authorizing submetering. If submetering has not commenced within five years of such Commission order, a new Notice of Intent to Submeter or Petition to Submeter shall be filed with the Commission.
- (f) Authorization to submeter shall continue when ownership of a submetered premises is transferred.

§ 96.4 Submetering in Master-metered Residential Cooperatives and Condominiums.

Master-metering with submetering in residential cooperatives or condominiums shall be authorized:

- (a) after filing a Notice of Intent to Submeter which includes the information, descriptions, plans, forms, certifications, and other materials and representations specified for such Notices in §96.5 of this Part;
- (b) after individual notices to owners or shareholders are provided pursuant to §96.3(c); and
- (c) upon the Commission's determination and order approving such submetering as in the public interest and consistent with the provision of safe and adequate electric service to residents. In making this determination, the Commission may rely on the Notice of Intent to Submeter and the information therein, when complete, as a rebuttable presumption that submetering at such premises is in the public interest and consistent with the provision of safe and adequate service to residents.



## § 96.5 Notice of Intent to Submeter and Petition to Submeter – Contents.

Each Notice of Intent to Submeter or Petition to Submeter filed pursuant to this Part shall include:

- (a) a description of the type of submetering system to be installed, including a demonstration in all Notices and Petitions submitted after January 1, 2016, that the submetering system, when installed, will be capable of service termination to individual units. Such description shall include the meter classification according to the manufacturer's name and proof of each submeter's conformance to the requirements in 16 NYCRR Parts 92 and 93. Authorization to submeter pursuant to this Part will be, unless modified by Commission order, contingent upon use of the named, or an identified comparable submetering system.
- (b) a description of the methods to be used to calculate the bills for individual residents when submetering is implemented, including the methods to be used to determine that the submetered bills, when rendered, will comply with the rate cap as set forth in this Part.
- (c) a plan for complying with the provisions of HEFPA. Such plan shall include, but is not limited to, a description or sample of the prospective submeterer's form to be used to determine residents assets, budget billing form, quarterly billing form, reminder notice, notice to social services of a resident's inability to pay, final termination notice, final suspension notice, the annual resident notification of rights, bill contents, budget or leveled payment plan, deferred payment agreement, and complaint handling procedures.
- (d) a "Submeterer Identification Form," which shall contain the premises' utility company account number(s) and the name, telephone number and address of the individual or individuals responsible for billing and for resolving resident complaints. For new accounts for which account numbers are not available when the Notice of Intent to Submeter or Petition to Submeter is filed, account numbers shall be made part of the Submeterer Identification Form when available to the applicant.
- (e) where applicable, a description of the method to be used to back out electric charges from rent, which shall include:
  - (1) a detailed description of how such monthly reduction to rent charges will be calculated; and
  - (2) a copy of the individual notice provided to residents explaining the basis and methodology for such rent or monthly maintenance reductions.
- (f) certification by the prospective submeterer that the following shall be included in plain language in all leases or agreements governing the premises to be submetered, which shall be filed with the Commission in the Notice of Intent to Submeter or Petition to Submeter:
  - (1) submetering complaint procedures,

- (2) the HEFPA rights and responsibilities of residents, and
  - (3) a provision stating that submetering refunds will be credited to submetered residents affected by the submeterer's actions that led to such refunds provided that the submeterer has such contact information for such resident.
- (g) proof of service that a Notice of Intent to Submeter or Petition to Submeter was sent from the prospective submeterer to the utility company providing electric service to the premises to be submetered.
- (h) documentation sufficient to establish that the refrigerators in all rental dwelling units are no more than ten years old or meet the most recently adopted federal energy efficiency standards for such appliances.
- (i) a description of the electric energy efficiency measures that have been or will be installed.
- (j) a description of the information and education programs that have been and will be provided to residents on how to reduce electric usage. Such programs shall include information to all residents before submetering commences as well as supplemental information to residents with above-average electricity usage in the first twelve months after submetering has begun.
- (k) When a Notice of Intent to Submeter or Petition to Submeter is made with respect to a premises in which 20% or more of the residents receive income-based housing assistance, such Notice or Petition shall include:
- (1) the name of each such assistance program in place at the premises, the agency administrator of each such program, the number of residents receiving assistance under each such program, whether the administrator of such program must approve the proposed submetering at such premises and, if so, when such approval was or may be granted.
  - (2) the utility allowance or rent reduction applicable to residents pursuant to each such assistance program.
  - (3) proof that an energy audit by a certified energy consultant has been conducted, a description of the energy efficiency plan for the premises, including, but not limited to, a refrigerator replacement plan, other specific conservation and weatherization measures that have been or will be installed, including those sponsored by the New York State Energy Research and Development Authority and/or other organizations, and information and education programs that have been or will be provided to residents on how to reduce electric usage. If a premises owner or operator has participated in a NYSERDA and/or other program to encourage energy efficiency, the prospective submeterer shall provide formal documentation in its Notice of Intent to Submeter or Petition to Submeter describing the energy efficiency rating its premises has achieved, which appliances will be EnergyStar® rated, and NYSERDA certification that its energy reduction plan is complete.

- (l) When a proposed conversion to submetering of an electric heat property or submetering in a new electric heat property is addressed through a Petition to Submeter, such petition shall, unless waived by the Commission for good cause shown, include:
- (1) a detailed description of the manner and extent to which electric heat is or will be provided to the residential units subject to submetering.
  - (2) a demonstration that electricity consumption for heating in dwelling units may be controlled by the resident of each unit by the use of programmable thermostats.
  - (3) either a forecast based on one year of apartment-level shadow billing or a study of actual submetered data from comparably situated buildings. Such forecast or study shall demonstrate that, when submetering is introduced, more than 60% of residents are expected to pay less, after accounting for savings from energy efficiency measures, energy conservation, and assistance that may be available from the Home Energy Assistance Program or other energy assistance programs, for the submetered electricity during the first 12 months of electric service than the amount of rent reduction they will receive as a result of the introduction of submetering during this period.
  - (4) proof that an energy audit by a certified energy consultant has been conducted, a description of the energy efficiency plan for the premises, including, but not limited to, a refrigerator replacement plan, other specific conservation and weatherization measures that have been or will be installed, including those sponsored by the New York State Energy Research and Development Authority and/or other organizations, and information and education programs that have been or will be provided to residents on how to reduce electric usage. If a premises owner or operator has participated in a NYSERDA and/or other program to encourage energy efficiency, the prospective submeterer shall provide formal documentation in its Petition to Submeter describing the energy efficiency rating its premises has achieved, which appliances will be EnergyStar® rated, and NYSERDA certification that its energy reduction plan is complete.
  - (5) when the Petition to Submeter is made with respect to a premises in which at least 25 of the residents receive income-based housing assistance, documentation to establish that the submeterer has registered as a Home Energy Assistance Program (HEAP) vendor. The Commission may require, when necessary, that a submeterer become a HEAP vendor.
  - (6) Submetering of electric in new premises shall not be subject to the filing requirements of §96.5(1)(3) or (4).
- (m) when a Petition to Submeter is for a conversion from direct metering to submetering pursuant to § 96.2(b) of this Part, the Petition shall include a demonstration that the building or complex for which submetering is sought will participate in building level demand response programs or will employ on-site co-generation plant or an alternative, advanced energy efficiency design.
- (n) such other or further demonstration, documentation, commitment or information which, in an order issued prior to the date on which such Notice of Intent to Submeter

or Petition to Submeter is filed, the Commission shall have identified as necessary to a determination that approval of such Notice or Petition is in the public interest and consistent with the provision of safe and adequate service to residents.

## §96.6 Electric Submetering Service Conditions.

All submeterers, whether authorized to submeter by Commission order, rule, or past practice, shall provide or continue to provide submetered service under the following conditions unless waived in whole or in part by Commission order for good cause shown:

- (a) a condition that submetering shall be in accordance with, as applicable, the Notice of Intent to Submeter, the Petition to Submeter, or similar filings made prior to the effective date of this Part, as authorized by the Commission or as modified by conditions adopted by the Commission as part of its review and approval.
- (b) a condition that each submetered residential unit in a multi-unit dwelling must be provided with a submeter or related equipment that allows for the termination of submetered electric service to that unit in the event that termination of such service is consistent with the requirements of HEFPA.
  - (1) The requirements of this paragraph shall not apply to submetering of electricity authorized by Commission order prior to January 1, 2016 or which is the subject of a Notice of Intent to Submeter or of a Petition to Submeter, filed with the Secretary prior to January 1, 2014;
  - (2) When submetering systems installed as of January 1, 2016 are replaced, any newly installed submetering systems shall be capable of service termination.
- (c) a condition that the submeterer shall not charge more than the applicable rate cap and that, in the event of charges greater than the applicable rate cap, the submeterer may be directed to provide credits to residents for such overcharges plus interest as consistent with Public Service Law §118 and 16 NYCRR §145.
- (d) a condition that the submeterer shall not charge time-of-use rates when the resident has not agreed to be billed using time-of-use rates.
- (e) a condition that the submeterer shall comply with the requirements imposed by HEFPA and that the submeterer shall notify residents, in either the lease to which they are a party, through their condominium or cooperative offering plan, or through other individual notice, of the consumer protections afforded the residents by HEFPA, and that the submeterer shall provide such consumer protections.
- (f) a condition that the submeterer shall respond to complaints filed with the Department of Public Service and forwarded to the submeterer in accordance with the Department's complaint procedures.
- (g) a condition that the lease or other residential dwelling agreement between a submeterer and a submetered resident shall not require or include binding arbitration as a means to resolve submetered service or billing complaints and that in addressing any such complaint the submeterer and the submetered resident shall follow the provisions of 16 NYCRR Part 12 – Consumer Complaint Procedures.

- (h) a condition that, at any premises for which submetering of electric service is permitted, but at which, pursuant to §96.6(c), equipment that is capable of terminating electric service to individual units is not required, the submeterer shall provide, in the event that the submetered resident is in arrears for the payment of charges for electric service, each HEFPA protection associated with the termination of electric service for unpaid charges that would be available to such resident if the submetered resident had been directly metered. Such HEFPA protections shall be provided notwithstanding the fact that the submetering and related equipment does not technically allow for such termination of service. Each protection shall be provided to such resident prior to the commencement of any other civil enforcement, collection, or other proceeding based on such resident's overdue electric charges.
- (i) a condition that the submeterer shall update the information contained in the Submeterer Identification Form submitted pursuant to §96.5(d) of this Part or that is on file with the Department of Public Service by filing with the Department of Public Service notice within ten days of any personnel change.
- (j) a condition that the bills to submetered residents be sent within thirty days of receipt of the distribution utility and/or Energy Services company bill for the master-metered service and that the submeterer shall retain billing records for a period of six years beginning with the effective date of this Part.
- (k) a condition that cross-wiring (for example, service through a shared meter) shall not exist at premises that are submetered.

## § 96.7 Electric Submetering Equipment Requirements

All submeterers, whether authorized to submeter by Commission order, rule, or past practice shall provide or continue to provide submetered service under the following conditions unless waived in whole or in part by Commission order for good cause shown:

- (a) all submetering products and ancillary equipment used to monitor electric flow to submetered residents and installed or replaced after January 1, 2014 must:
  - (1) comply with the provisions of 16 NYCRR Parts 92 and 93; and
  - (2) be physically compatible with the service endpoints of the premises' electrical system. Submeters shall be equipped with viewable registers, accessible to the resident so the resident may monitor their own kWh consumption or shall provide alternate mechanisms to allow residents to monitor their own consumption such as through a computer program.
  - (3) submeters that are calibrated to register a fixed fraction of the electricity consumed should display the meter register multiplier which will be used to determine the resident's actual kilowatt hour usage. Any register multiplier used should be indicated on resident bills.
- (b) Ensuring Continued Submeter Performance – submeter inspection and testing programs shall be instituted to ensure that residents of submetered premises continue to receive reliable and accurate electric consumption measurements. The submeterer or submeterer's agent shall conduct an annual testing program to analyze a statistically significant sample of the in-service submeters in accordance with the testing procedures and standards outlined in 16 NYCRR Parts 92 and 93. Submeters that do not meet the requirements of 16 NYCRR Parts 92 and 93 shall be corrected or recalibrated as soon as practicable but no later than 1 year after testing unless otherwise ordered by the Commission.
- (c) Cost of Meter Tests for all Submeters – the cost of testing a submeter's accuracy shall be borne by the submeterer to the extent described in this paragraph. A recipient of submetered service may request and receive one submeter test at no cost during a twelve month period when the request is made pursuant to a consumer complaint. A recipient of submetered service may request more than one meter test during a twelve month period and may request that the test be witnessed by Department of Public Service staff; however, if the submeter is not out of the limits as prescribed by Part 92, the person requesting more than one annual test will bear the cost of such additional meter tests.

## §96.8 Failure to Comply with this Part.

- (a) Any failure to submeter in compliance with this Part or 16 NYCRR Parts 92 or 93, as referenced herein, may result in Commission action that (1) rescinds, suspends, limits or stays the submeterer's authorization to submeter electricity, or its authority to render bills to and collect payments from submetered residents; (2) terminates electric service to the submetered premises or orders rebilling, or billing refunds; or (3) results in a penalty action under the Public Service Law or in other Commission enforcement proceedings. Any such actions shall be taken in accordance with the Public Service Law and Commission procedures.
- (b) In addition, or in the alternative, a failure to submeter in compliance with this Part or 16 NYCRR Parts 92 or 93 as referenced herein, may result in up to a 40% reduction of the rate cap. Prior to establishing a reduced rate cap, the Department of Public Service shall:
  - (1) provide to the submeterer a Notice of Alleged Violation stating with specificity the violations(s) of regulations, Commission orders, statute(s) or tariff(s) found after Department investigation as well as the Department's proposed rate cap;
  - (2) Require that the submeterer provide a copy of the Notice of Alleged Violation to residents along with information on how residents may provide comments within 10 days to the Department of Public Service regarding such Notice.
  - (3) Allow the submeterer 15 days from the date of the Notice of Alleged Violation to respond to such notice;
  - (4) Allow the submeterer 20 days from the date of such response or 30 days from the Notice of Alleged Violation to cure the failures identified therein; and
  - (5) Send to the submeterer a Notice of Rate Cap Reduction stating the basis for the rate cap reduction, the level of rate cap reduction and, the date(s) upon which the rate cap reduction shall be in effect. The rate cap reduction shall be in effect no less than 20 days after the Notice of Rate Cap Reduction.
- (c) Any rate cap reduction implemented by the Department of Public Service pursuant to §96.2(a)(2) (rate cap) of this Part may be appealed to the Commission within 15 days of the Notice of Rate Cap Reduction. Any such appeal will toll the period during which a Department rate cap reduction will be in effect.
- (d) By undertaking to submeter pursuant to a Commission Order granting a Notice of Intent to Submeter or a Petition to Submeter issued under this Part or by continuing to submeter, the submeterer shall have consented to the jurisdiction of the Commission to impose the enforcement remedies (1) described in this Part or (2) described in the Public Service Law and applicable in the event a company, corporation or person fails to obey and comply with a provision of the Public Service Law, or a regulation or order of the Commission applicable to it.



§96.9 Severability

If any provision of this Part is adjudicated invalid by a court of competent jurisdiction, such invalidity shall not affect the other provisions which can be given full effect without the invalid provision(s).